

Superior Court
Barnstable, ss

Filed DEC 07 2018

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
BARNSTABLE SUPERIOR COURT
INDICTMENTS 1772 CR 0107

COMMONWEALTH OF MASSACHUSETTS :

vs. :

JASON MCCARTHY, :

Defendant, :

AMENDED MOTION TO SUPPRESS
A.L.P.R. (Automatic License Plate Reader)

NOW comes Jason McCarthy, by and through Counsel, and hereby respectfully requests that this Honorable Court **SUPPRESS** from use, both substantively and for impeachment purposes, any/ all evidence, physical, testimonial and observational, obtained and to be used by the Commonwealth in their case in chief obtained as a result of use of the Automatic License Plate Reader, hereafter *A.L.P.R.*, on both the Bourne and Sagamore Bridges, and it's data/ information.

Specifically, Mr. McCarthy moves to suppress the following pieces of EVIDENCE obtained by the Barnstable Police on February 22, 2017, when the Black Hyundai Tucson SUV, MA Registration 136AB6, Mr. McCarthy was in, was unlawfully and without a warrant, tracked and stopped on Route 132 in the Town of Barnstable, Massachusetts.

Mr. McCarthy was seized and arrested, upon use and reliance of the *A.L.P.R.* by the Commonwealth of Massachusetts. Mr. McCarthy was seized and arrested upon use and reliance of the data/information supplied by the *A.L.P.R.* by the Barnstable Police Department:

- ITEM 1. All statements, admissions, confessions made by Mr. McCarthy when interrogated roadside;
- ITEM 2. All statements, admissions, confessions made by Mr. McCarthy when interrogated at the Barnstable Police Station;
- ITEM 3. Approximately \$917 in U.S. Currency allegedly seized from Mr. McCarthy;
- ITEM 4. 3 cell phones seized from Mr. McCarthy.
- ITEM 5. Contraband/Substances found on Brian Whittemore, Sr.,



ITEM 6. All A.L.P.R. data/information collected by the Commonwealth of Massachusetts and the Barnstable Police Department on Mr. McCarthy and the Black Hyundai Tucson SUV, MA Registration 136AB6.

ITEM 7. All observations made of Jason McCarthy and Brian Whitmore, Sr., on February 22, 2017, by the Barnstable Police Department.

IN SUPPORT HEREOF, Counsel states:

1. **WHEREFORE**, all aforementioned EVIDENCE, was obtained using data/information from the A.L.P.R., in violation of Mr. McCarthy's rights against unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. The data/information was a "wire or electronic communication" contained within an "electronic communications system, service or storage." No warrant was applied for and probable cause failed to exist for the issuance of a warrant, before the Barnstable Police were allowed to acquire historical data/information that "chronicle[d] [Mr. McCarthy's] past movements," as well as, contemporaneous movements.

2. **WHEREFORE**, all aforementioned EVIDENCE, was obtained using data/information from the A.L.P.R. in violation of Mr. McCarthy's rights against unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. No warrant was applied for and probable cause failed to exist for the issuance of a warrant, before the Commonwealth of Massachusetts was allowed to acquire/use data/information that "chronicle[d] [Mr. McCarthy's] movements," and to store the data/information and to give it out, without a warrant, to the Barnstable Police, other Police Departments and third parties. The A.L.P.R. captured and stored innocent movements of Jason McCarthy, only later for it to be accessed and used against him in criminal prosecution.

3. **WHEREFORE**, all aforementioned EVIDENCE, was obtained by the Barnstable Police Department and the Commonwealth of Massachusetts using data/information from the A.L.P.R. in violation of Mr. McCarthy's rights of privacy and rights of freedom from arbitrary governmental action, pursuant to the Fourth Amendment to the United States Constitution, Article 14 of the Massachusetts Declaration of Rights, and M.G.L. c.214, sec. 1B.

4. **WHEREFORE**, all aforementioned EVIDENCE was obtained using data/information from the A.L.P.R. in violation of Mr. McCarthy's reasonable expectation of privacy in the whole of his physical movements pursuant to the Fourth Amendment to the United States Constitution, Article 14 of the Massachusetts Declaration of Rights and M.G.L. c.214, sec. 1B.

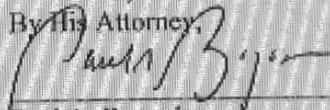
5. **WHEREFORE**, unknowing to Mr. McCarthy and all citizens of the Commonwealth, the A.L.P.R. unlawfully captured/captures data/information on his and they're every day freedom of movement and wrongfully allowed/allows the Commonwealth and the Barnstable Police Department and all Police Departments to access/use the data/information to target/track Mr. McCarthy's and they're whereabouts, without Judicial review, probable cause and/or a search warrant, in violation of the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights, and in violation of M.G.L. c.276, sec.1 and M.G.L.

c.276 sec. 1B. The data/information, it's capture, it's storage, it's transfer and the mechanical, electronic, computer, and communications systems involved represent activity pursuant to the *Electronic Communications Privacy Act*, 18 U.S.C. sec. 2510-2522, and the *Stored Communications Act*, 18 U.S.C. 2701-2712, and the accessing/use of this data/information without either a warrant, a court order, and/or probable cause is a violation of these Acts, and a violation of Mr. McCarthy's rights.

6. **WHEREFORE**, uniform policies of use and/or retention of the A.L.P.R. data/information are not in existence. Any current rules in existence are arbitrarily decided upon by the Police and the Commonwealth of Massachusetts, which allowed the Barnstable Police Department and the Commonwealth of Massachusetts to violate Mr. McCarthy's rights pursuant to the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights, M.G.L. c.276, sec.1 M.G.L. c.276, 1B, and/or 214, sec.1B. The data/information, it's capture, it's storage, it's transfer and the mechanical, electronic, computer, and communications systems involved represent activity pursuant to the *Electronic Communications Privacy Act*, 18 U.S.C. sec. 2510-2522, and the *Stored Communications Act*, 18 U.S.C. 2701-2712, and the accessing/use of this data/information without either a warrant, a court order, and/or probable cause is a violation of these Acts, and a violation of Mr. McCarthy's rights.

7. **WHEREFORE**, reasonable Suspicion failed to exist to stop Jason McCarthy and/or the Black Hyundai Tucson SUV, MA Registration 136AB6 on February 22, 2017, Mr. McCarthy was in, without the use of A.L.P.R. historical data/information. Additionally, the Barnstable Police would not have known that Jason McCarthy, the target of their investigation, was driving onto the Cape to effectuate a stop and seizure, without the use of A.L.P.R. contemporaneous data/information. The A.L.P.R., wrongfully tracked Mr. McCarthy in violation of the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights, United States Code 18 U.S.C. 2510-2522 and 18 U.S.C. 2701-2712, and without a warrant or court order existing. The A.L.P.R. data/information should be suppressed, as should the stop of Jason McCarthy, Jennifer Boucher and Brian Whittemore, Sr. and all physical and testimonial evidence seized as a result of the stop, ALL FRUITS AND evidence OF THE poisonous tree derived from the use of the A.L.P.R. data.

Respectfully Submitted,
Jason McCarthy,
Defendant,
By His Attorney,

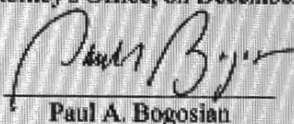


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CERTIFICATE OF SERVICE

I, Paul A. Bogosian, Esq., hereby certify that a true and accurate copy of this Motion with Supporting Affidavit was served, via 1st class mail, upon the Barnstable County District Attorney's Office, on December 4, 2018.



Paul A. Bogosian